In the Supreme Court of the United States

OCTOBER TERM, 1936.

No. 716.

GREAT LAKES TRANSIT CORPORATION,
Petitioner,

AGAINST

INTERSTATE STEAMSHIP COMPANY and
ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Intervening Underwriters,
Respondents.

BRIEF FOR
INTERSTATE STEAMSHIP COMPANY,
A RESPONDENT,
Opposing Petition for Writ of Certiorari as to One Branch of the Case—The Collision.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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The steamer George D. Dixon, owned by petitioner, was in collision with the steamer Willis L. King, owned by Interstate Steamship Company, a respondent. The collision happened in the St. Clair River. As found by the District Judge (R. 242):

> "The collision occurred about 5:40 p. m. on the Canadian side of St. Clair river at Port Huron-Sarnia, just at the conclusion of a sudden and severe storm of wind and rain which had greatly obscured the view on the river."

The St. Clair River runs southerly from Lake Huron to Lake St. Clair. At the entrance, on the Michigan side, is the city of Port Huron, and on the Canadian side, the city

of Sarnia. The collision happened some 400 or 500 feet from the Canadian shore, (R. 138, 249) where the river is about 1700 feet in width, there being an error in the record (p. 82) where the width is given as "700 feet." The King, a vessel some 580 feet in length (R. 58), was downbound; the Dixon, about 350 feet in length (R. 58), was upbound. The King, for a considerable time before the collision, had been navigating in thick weather on the Canadian side of the river.

Throughout the trial the old nomenclature was used, that is to say, when a vessel ported, it meant going to her own right. When she starboarded, it meant going to her own left. The District Court found both vessels at fault, the King for excessive speed and for violating a one-blast passing agreement; that is to say, in failing, after one-blast signals had been exchanged, to alter her course to her own starboard, or right, and so meet port to port. The Dixon was held at fault, on her own story, because knowing that the King was on the Dixon's starboard bow, that is, to the Dixon's right (looking ahead) and continued to be there after the first exchange of passing signals, she, the Dixon, as said by the District Judge (R. 250):

> "having already ported one half point, again ported her helm another point after receiving the second passing signal; and after the third was received and before she definitely located the position and course of the King, ported still more and came across the King's bows."

Two separate suits (consolidated for trial) were brought in Admiralty Court, the libel in the first (R. 2) being filed by Interstate Steamship Company, owner of the King, *in personam*, against Great Lakes Transit Corporation, owner of the Dixon. The second libel (R. 16) was filed, *in rem*, against the King by Great Lakes Transit Corporation "as owner of the Steamer 'George D. Dixon,' and as carrier and/or bailee of cargo lately laden on the

Steamer 'George D. Dixon'." This libel sought to recover both for the damage sustained by the Dixon and for the damage sustained by cargo carried on the Dixon, the proctors who signed the libel representing both the owner of the Dixon and the Dixon's cargo insurers. After the District Judge had filed his opinion holding both vessels at fault and ordering a division of the damages, petition for reargument was filed (R. 251) and overruled (R. 252), the Court stating that after "careful consideration" he could find nothing submitted for the Dixon that would induce him to change his conclusion, and he called particular attention to the case of *The Quoque*, 47 Fed. (2d) 873, as sustaining his ruling that the Dixon was at fault, adding:

> "I do not see how the decision could have been otherwise than it was, and the petition for reargument is denied."

The Dixon's cargo insurers, Atlantic Mutual and others, then (R. 253) filed an intervening petition seeking to recover back losses already paid and to be paid on account of damage to the Dixon's cargo.

On June 9, 1934 (R. 315) the District Judge filed opinion and decision in respect to the right of the cargo insurance to recover. On July 27, 1934 (R. 317) a supplemental opinion and decision was filed and on the same date (R. 319) interlocutory decree was filed. This decree adjudged both vessels at fault with consequent division of damages and as to the cargo insurance, provided in substance that cargo underwriters might recover back their losses, one-half from the King and the other half from the Dixon.

An appeal was taken and notice thereof, with petition and assignments of error, were filed on August 8, 1934. (R. 324, 326, 328.) Thirteen of the assignments of error pertain to the collision, thirty-one to the cargo insurance question. The Court of Appeals on June 5, 1936 filed opin-

ion (R. 348) affirming the District Court on both branches of the appeal,—the fault as to the collision and the award as to the cargo insurance. Also on June 5, (R. 347) decree was filed affirming the decree of the District Court. On July 3, 1936 Great Lakes Transit Corporation filed a petition for rehearing (R. 361), the petition, as well as the supporting brief (R. 364) being limited solely to the cargo insurance question, and there being no prayer for, nor suggestion as to, a rehearing on the finding that the Dixon was in fault with respect to the collision. The prayer of the petition for rehearing (R. 362) reads:

> "Wherefore, your petitioner prays that a rehearing may be granted to it in this cause, upon the issue as to the rights of the Atlantic Mutual Insurance Company and similarly situated underwriters."

The Statute, 28 U. S. C., Sec. 350, provides that an application for certiorari shall be made within three months after the entry of the judgment or decree in the lower court. As has been shown, the decree of the Court of Appeals was filed June 5, 1936, and no petition or motion was made for a rehearing as to the collision case. True, a petition was filed asking for a rehearing as to the insurance question, but the record shows clearly that the owner of the Dixon was quite content to accept the judgment of the two lower courts that the Dixon should be held at fault. Now, however, the petition for certiorari seeks to have this Court review the collision liability as well as the cargo insurance controversy.

ARGUMENT.

We discuss the collision question only. Respecting the rights of the cargo insurers, the King, as in the lower courts, is not concerned. As stated in the opinion of the Court of Appeals (R. 355), the King, in the answer filed to the insurers' intervening petition,

"asked that its rights be preserved and that a decree be entered, showing that the King and the Dixon were mutually at fault and dividing the damages and costs equally between the owners of the steamers."

No appeal from the District Court was taken for the King because, while not all the findings of the District Judge as to her navigation were accepted, the proof as to her speed was sufficient to condemn her.

The Court of Appeals adopted the findings of the District Court as to the navigation of the two ships, including speed, location, distances and signals.

The District Judge found (R. 248):

"When the vessels came into each other's view they were, according to the more satisfactory evidence, 400 or 500 feet apart."

and the further findings on the Dixon's own testimony were (R. 249):

"The testimony from the Dixon is that on hearing the fog signal of the King, her lookout reported a ship ahead, which the mate thought was a little on the starboard bow. When the King's first passing signal of one blast was received, the lookout reported it a trifle on the starboard bow, and Capt. Goodberry ordered the helm ported one half point. The lookout then heard the King's second passing signal and reported a ship one half point off the starboard bow, whereupon the captain ordered a further change of the helm of an additional point to port.

After receipt of the third one-blast signal, Capt. Goodberry testifies he told his wheelsman to port again and keep her coming. He then heard the King's alarm, saw her flash on his port side and heard a two-blast signal and the King came into full view. Seeing no chance of making the starboard passing as requested, he blew one whistle and shouted 'Hard aport.'

* * *

* * * it must be found * * * after the Dixon had ported one half point, because of the steamer

ahead, the second passing signal of the King and the report of the lookout notified Capt. Goodberry that the approaching steamer was still about half a point off to starboard, whereupon he ordered the Dixon ported another point; and that after the third exchange of one-blast signals but before the King's alarm and when it was apparent that the other vessel was close and still approaching the course of the Dixon, Capt. Goodberry gave his wheelsman an order to port again and keep her coming."

The District Court's conclusion from the findings was (R. 249):

"Under these circumstances, and when after the Dixon's first change of course to starboard, it was discovered that the King continued on in her direction, Capt. Goodberry should have appreciated that the approaching vessel was being very badly navigated or was laboring under some serious misunderstanding and that there was risk of collision unless the Dixon took prompt steps to prevent it. He should then have sounded alarms and stopped her headway. • • •

• • • the Dixon, having already ported one half point, again ported her helm another point after receiving the second passing signal; and after the third was received and before she definitely located the position and course of the King, ported still more and came across the King's bows. Counsel for the Dixon say it was her duty to keep to starboard under her passing agreement, with which she had the right to assume the King would comply. But when it became apparent that the King was not complying, the duty arose to meet the new situation by the exercise of such precautions as prudent navigation required. The Dixon changed her course without knowing where the King would be found, instead of adopting the simple precautions against collisions in thick weather, provided by the rules, and for this she must be found negligent." Citing *The North Star* (C. C. A. 6), 62 Fed. 71; *The Roby* (C. C. A. 6), 111 Fed. 601; *The Quoque* (C. C. A. 2), 47 Fed. (2) 873.

Paraphrased, the glaring and condemnatory faults of the Dixon were that, having heard a fog signal off her starboard bow, and after having heard and accepted a one-blast, or port to port, passing signal, from the approaching vessel, still off her starboard bow, but hidden from sight by the rain and fog, and having ported half a point to effect a passing, later, on hearing a second one-blast signal, still off her starboard bow, with the approaching vessel still hidden from view, the Dixon, when she should have known it was a dangerous situation and should have stopped and blown an alarm, instead answered with one blast, inviting the King to come on, and ported again, this time a point, and ported still more on receiving and accepting a third one-blast signal. The Dixon thus knowingly swung directly toward and across the course of the down bound King.

Petitioner's brief, page 3, and following, undertakes to argue that technically the pilot of the Dixon did not violate Rules 23 and 26 of the Navigation Rules of the Great Lakes (White Law) 33 U. S. C. Secs. 288 and 291, and therefore should be held blameless. Now, as well as in briefs and arguments in the courts below, petitioner makes a basic error in assuming that each of the statutory Navigation Rules stands isolated and by itself and is inclusive, whereas courts of high authority have held that statutory rules of navigation and particularly the rules now under discussion must be construed together and that with them there must be applied general rules of good seamanship and cautious navigation as determined by courts of admiralty.

A "preliminary" statement to the Pilot Rules published under governmental authority, and in which are included the statutory rules of the White Law, reads:

> "*Risk of Collision* can, when the circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does

not appreciably change, such risks should be deemed to exist." (Italics in text.)

One of the first Great Lakes collision cases decided after the adoption of the White Law in 1895 was *The George W. Roby* (C. C. A. 6) 111 Fed., 601. Judge Lurton wrote the opinion and said, page 609, that the rules of the White Law, including Rules 23 and 26, must be read and construed together. Then, referring to the language of Rule 28 of the White Law, 33 U. S. C. 293, that a vessel shall not be exonerated from the consequences "of a neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case" it is said that the "cautious" navigation required under Rule 15 or the precautions that should be taken by vessels approaching each other in a fog, depends upon the special circumstances and in the determination of any question arising out of the navigation of the ships, where the regulations prescribed by Congress do not expressly apply (609):

> "resort must be had to the sailing usages and principles of navigation which are not superseded by the positive terms of the statute. These rules or sea laws defining the precautions required by good seamanship and cautious navigation, are to be deduced from the decisions of courts of admiralty, and are not to be regarded as superseded, except in so far as they are inconsistent with the statutory regulations."

Respecting the relation between statutory rules of navigation and general maritime law, the Court of Appeals of the Second Circuit in *The George S. Tice*, 287 Fed., 127, at page 129, says:

> "But over and underlying all the rules of navigation is that rule of common sense, so often referred to, that no one has the right to run into collision."

The New York, 175 U. S., 187, not a fog case, but a standard and leading authority going to fundamentals, in-

volved a collision in the Detroit River. Both vessels were condemned, one of them because, having signaled the other, and receiving no answer, she failed to stop. As to this it is stated in the opinion by Mr. Justice Brown, that (201):

> "The duty of the Conemaugh at this juncture was plain, she should have stopped her engines after the second signal, and, if necessary to bring her to a complete standstill, have reversed them. Nothing is better settled than that, if a steamer be approaching another vessel *which has disregarded her signals or whose position or movements are uncertain she is bound to stop until her course be ascertained with certainty.*" (Italics ours.)

On page 205, the following language is quoted from *The Sunnyside*, 91 U. S., 208, 222:

> "Cases arise in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained not to promote collisions, but to save life and property by preventing such disasters."

An often quoted declaration from the opinion in *The New York* as to the underlying responsibility of those in charge of the navigation of ships is (p. 207):

> "She," referring to one of the ships involved in the collision, "should have known that if she continued her course a collision would be inevitable, and yet she did not stop or reverse. Her conduct was inexcusable. The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn, but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect."

Applying these rules,—statutory and of the Admiralty Courts,—to the case of the Dixon, the District Court was

right in saying that when the Dixon knew that notwithstanding the exchange of one-blast signals, the King still remained on her starboard bow, then the Dixon should have sounded an alarm, stopped and reversed. The Court of Appeals likewise was correct in its declaration that the master of the Dixon

> "could not forego any precaution on his part simply because the King was being badly navigated. The failure to blow a danger signal in the face of the King's palpable confusion in blowing a second port to port passing signal when it was still in line for a starboard passing, was negligence."

Petitioner's brief, page 13, says "Research discloses no case where one vessel has been condemned for failing to supervise the navigation of another." This argument fails entirely to reach the situation. It is not a question of the navigator of one ship supervising the navigation of the other, but it is a question of the navigator of one ship being bound to take cognizance of the obvious failure of the other ship properly to navigate. That is the doctrine of *The New York, supra,* and it is the doctrine announced by the Court of Appeals, Sixth Circuit, in *Duluth S. S. Co. v. Pittsburgh S. S. Co.*, 180 Fed., 656. This was a case of collision between the steamers Sylvania and Bessemer, happening just as a fog was clearing, and is very similar to the present case of the King-Dixon. It was held that the Sylvania clearly was at fault, but in the District Court the Bessemer escaped condemnation. The Court of Appeals, however, on the Bessemer's own story, found her at fault also, saying (opinion, page 659) that after danger became clearly apparent to the Bessemer, she was not stopped nor were danger signals given and on the authority of *The New York, supra,* the Bessemer was condemned, the court saying:

"The master of the Bessemer saw that the Sylvania was not doing her duty under the passing agreement which he says had been reached, and that, if her course was kept up, a collision was inevitable, yet he relied upon the Sylvania to change her course so as to pass according to the agreement as the Bessemer understood it, and he continued to rely upon the Sylvania to avert the accident, until it was too late for either to do so.

To the Bessemer it was a clear case of apparent danger of collision, with time to avoid it. She could have stopped or blown the danger signal when it was first apparent that the Sylvania was less than three-quarters of a mile away, moving rapidly, and in violation of the passing agreement."

The rule for which we contend was applied also in the *Elphicke-Poe* (C. C. A. 6), 123 Fed., 405 (not a fog case). Judge Lurton, afterwards Mr. Justice Lurton, who had so well defined the relation of the statutory rules of navigation and general "sea laws" in *The George W. Roby, supra,* was a member of the Court in the *Elphicke-Poe* case. The facts as to the relative situations of the King and Dixon, just preceding the collision, as claimed by the Dixon and found by the trial court, make the case almost identical in that respect (as to the situation, one ship to the other) to the reported case of the *Elphicke-Poe,* where the collision happened in the St. Clair River about 400 feet out from the Canadian Shore and not far from the place where the King and Dixon came together. The Elphicke was downbound, the Poe upbound. They exchanged one-blast passing signals, thus agreeing to a port to port meeting. The downbound ship, the Elphicke, failed to alter her course sufficiently to her starboard or right. A collision resulted. The Poe manifestly was at fault for not directing her course to her starboard, as the Elphicke had a right to assume she would. For the Elphicke, as for the Dixon in the pending case, it was argued, quoting from the opinion

(p. 406) "that one of two meeting vessels has a right to expect that the other will do her duty and may govern her own course in that expectation," citing *The Victory* and *The Plymothian,* 168 U. S., 410, a case relied upon by petitioner (Br. pp. 8, 12, 14, 15), but the court held, not that the Elphicke should have "been condemned for failing to supervise the navigation" (Br. 13) of the Poe, but that the Elphicke, with a collision impending, should have tried to avoid it. The Poe, the court found, "had plenty of room and time in which to avoid the disaster after the danger of it began to appear." (p. 406.) Seeing the Elphicke out of her proper place, the Poe "depended on the Elphicke to retrieve her fault and refused to vary her own course." The opinion continues "The law gives no countenance to such perversity, but, on the other hand, exacts of each vessel that, notwithstanding the errors of the other, it shall to the end do all in its power to avoid the consequences of the fault."

In *The Quoque* (C. C. A. 2), 47 Fed. (2d) 873, referred to by the District Judge in his opinion (R. 250) and also in overruling the motion for rehearing (R. 252), much reliance was placed on *The Victory* and *The Plymothian, supra,* but the Court, citing, among other cases, *The New York, supra,* and *The Albert Dumois,* 177 U. S., 240, said (p. 874) that independently of what the Pilot Rules may require, the courts have very definitely declared that there is a duty to stop and reverse as soon as danger of collision is seen to exist, because of doubt as to what the other vessel may do.

So, as to the Dixon, she heard repeatedly, and finally also saw, the King off her starboard bow, notwithstanding the passing agreement called for the King to get over on the Dixon's port bow, but instead of blowing an alarm or stopping and reversing, or both, the Dixon kept on a course right across the King's bows.

These cases of *The New York, The Albert Dumois,* the *Sylvania-Bessemer,* the *Elphicke-Poe,* and *The Quoque,* meet the fallacy of the suggestion in petitioner's brief as to one vessel supervising the navigation of the other. The law is that one vessel seeing another vessel being badly navigated should herself navigate so as, if possible, to avoid impending disaster. When the Dixon became aware that the King was not observing the one-blast passing agreement, she should have blown an alarm and stopped.

Petitioner's brief, page 13, seeks to have the "gross fault rule" applied. This question was raised also in the lower courts and in respect thereto the District Court said (R. 250):

> "The Dixon and her owners may not escape responsibility under the rule requiring evidence of her fault to be clear and convincing, assuming such rule to apply. All evidence on that point against her comes from her master and crew, and the court has made no 'over scrupulous search for possible faults' with which to charge her. *Steffens v. U. S.,* 32 F. (2d) 206. The negligence here was of the character found in *Lie v. San Francisco & Portland S. S. Co.,* 243 U. S. 291, and both vessels will be found at fault and the damages divided accordingly."

The case of *Lie v. San Francisco & Portland S. S. Co.,* cited by the District Court, should be quite sufficient authority on this question. In the syllabus is this language:

> "When a collision is attributable to the palpable negligence of both masters, the negligence of each continuing to operate as an efficient cause until the moment when the accident occurs, the doctrine of major and minor fault does not apply."

We add, however, *The Albert Dumois,* 177 U. S., 240, where, at page 253, this Court, through Mr. Justice Brown, said:

> "This Court has repeatedly held the fault, and even the gross fault of one vessel, does not absolve the other

from the use of such precautions as good judgment and accomplished seamanship require."

The faults as to the collision were passed upon three times, twice in the District Court,—on the original hearing and on the motion for rehearing,—and once by the Circuit Court of Appeals, and each time the Dixon was condemned. The point now principally argued in the petition for certiorari, that the Dixon did not violate any statutory rule, was advanced in the petition for rehearing in the District Court, where, in the memoranda overruling the motion (R. 252), the Judge said that under "the general duty of careful navigation 'independently of what the Pilot Rules may require' " he could not see how the Dixon could be exonerated. In the Court of Appeals this same question was argued and the court determined that the master of the Dixon (R. 354) "could not forego any precaution on his part simply because the King was being badly navigated."

The trial court and the appellate court both having found that on the facts the negligence of the Dixon was a cause contributing to the collision, a review by this Court as to the collision should be denied.

Respectfully submitted,

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February 23, 1937.